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**Supreme Court of the
United States**

OCTOBER TERM, 1945.

No. 156

**E. M. GEORGE-HOWARD AND WOODY
SWEARINGEN, PETITIONERS,**

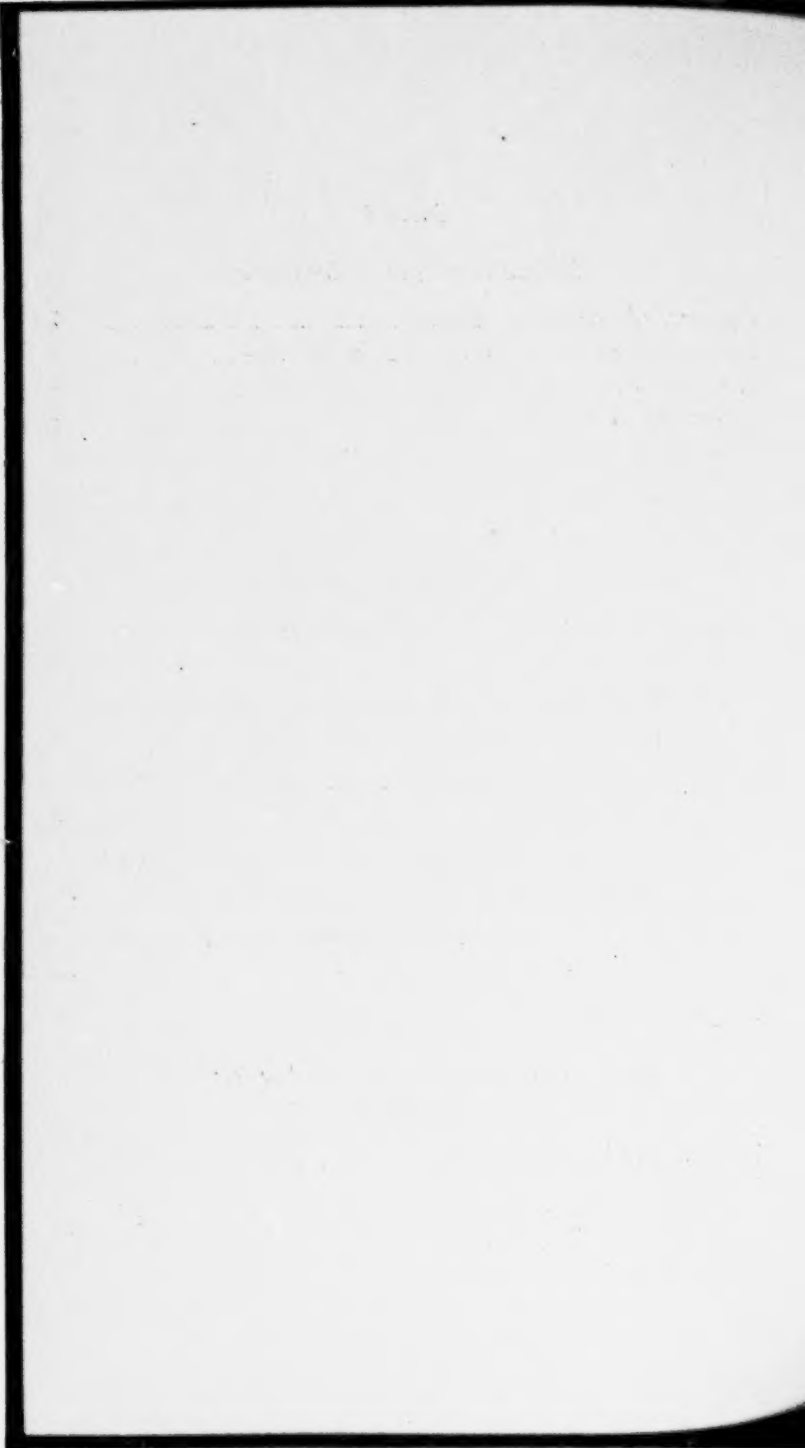
VS.

**FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENT.**

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF.**

✓ **B. C. HOWARD,
911 Commerce Building,
Kansas City 6, Missouri,
*Attorney for Petitioners.***

**HARRY HOWARD,
230 Dierks Building,
Kansas City 6, Missouri,
*Of Counsel.***



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Supreme Court of the United States

OCTOBER TERM, 1945.

No. _____

E. M. GEORGE-HOWARD AND WOODY
SWEARINGEN, PETITIONERS,

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:

E. M. George-Howard and Woody Swearingen, petitioners in the above entitled case, respectfully pray the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review an opinion and judgment of the Circuit Court of Appeals rendered herein on February 18, 1946 (R. 88-98), which reversed the judgment entered by the United States District Court for the Western District of Missouri on August 16, 1944 (R. 46).

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in this case, is reported in 153 F. 2d at page 591 and appears on pages 88 to 98 of the transcript of the record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was brought by Respondent in the District Court of the United States for the Western District of Missouri to recover the sum of \$6,877.19 placed with Petitioner, Woody Swearingen, under an escrow agreement (R. 22 and 66) between Respondent and Petitioner E. M. George-Howard, then the sole stockholder of the Nevada Trust Company, a Missouri banking institution of Nevada, Vernon County, Missouri. The sum, lifted out of the assets of the Trust Company under the escrow agreement and under an order of the Circuit Court of Vernon County, Missouri, measures the interest claimed by Respondent to have been due on the principal of its payments, totalling \$120,948.14, paid to the insured depositors of the Trust Company (R. 15 and 59). The time for which interest is claimed ran from the closing of the Trust Company, December 2, 1937, until Respondent was from time to time and finally reimbursed out of the Assets. The interest is figured at six per cent, but the basis for that rate is not shown. Respondent took written assignments, of the claims of the depositors (R. 13 and 57); made its payments, and claimed the escrow fund in virtue of its assignments and of allowances of claims for reimbursement by the Finance Commissioner and of the approval and directing payment thereof by the Circuit Court. All the claims

for reimbursement of moneys paid the Depositors were timely presented, under the statute of Missouri (Sec. 7928, R. S. Mo., 1939) and were duly paid. In none of the claims so presented, however, did Respondent claim any interest, whatsoever. The claim for interest, aggregating the amount of the Escrow Fund, was presented to the Finance Commissioner for allowance February 26, 1941, long after the end of the time, May 6, 1938, fixed under the Missouri Statute, *supra*, for presenting claims. The interest claim was rejected by the Commissioner; but no suit was brought thereon within six months thereafter as required by Sec. 7932, R. S. Mo., 1939, providing for suits on rejected claims (See R. 81-84) (Also R. 26, 27 and 89).

Respondent, to invoke the jurisdiction of the U. S. District Court, pleaded that it was organized under the Act of Congress, Sec. 264, Title 12, U. S. C.; that under subsection (j) fourth, thereof, "The cause is deemed to arise under the laws of the United States" (R. 12) "And (by a later amendment) (R. 42) the Federal Government owns more than one-half of the capital stock of said corporation."

As part of its cause of action, Respondent set out in its amended complaint, Title 12—Sec. 264 (1) (6) and (7), providing for payment of deposits, "whenever an insured bank shall have been closed on account of inability to pay the demands of its depositors"; but prohibiting payment in the case of a state bank, "until the right of the corporation to be subrogated to the rights of depositors on the same basis as provided in the case of a closed national bank under this section, shall have been recognized either by express provision of state law, by allowance of claims by the authority having supervision of such bank, by assignment of claims by depositors, or any other effective method. * * * Provided, that the rights of depositors and other creditors of any state bank shall be determined in accordance with the applicable provisions of state law" (R. 14).

Petitioner's amended answer (R. 29-34) pleaded that subsection (j), Fourth, Title 12, Sec. 264, U. S. C. A., was unconstitutional as invading the judicial power of the Federal Courts in violation of Sec. 2 of Article III of the Constitution of the United States; that the cause attempted to be stated was for interest alone, and therefore not contemplated as a basis for jurisdiction of the District Court, under Title 28, Sec. 41 (R. 35); that the special statutes of limitation, Sec. 7928 and Sec. 7932, R. S. Mo., 1939, barred the cause of action; that to hear the claim, would be to allow respondent to split its cause of action, to the vexation of both Petitioners and the Courts; and further, that the Trust Company was closed, not "on account of inability to meet the demands of its depositors," as required by the incorporating act of Respondent, *supra*; but that it was closed by the Finance Commissioner of Missouri at the wrongful instigation of Respondent, because of "Respondent's dissatisfaction with the management of the bank"; that there was never any question of its solvency.

Neither did Respondent plead that the bank was unable to pay the depositors; nor does the record show that the Nevada Trust Company was closed for any other reason than the demand of Respondent on the Missouri Finance Commissioner, because of Respondent's dissatisfaction with the management (R. 13, 31 and 64-65).

The evidence offered did not sustain respondent's averment that the Federal Government owns more than one-half of the capital stock of the Federal Deposit Insurance Corporation. The affidavit of E. F. Downey, Secretary (R. 76), merely gives the amount of stock respectively paid for and issued to the Government and to the several Federal Reserve Banks. What the subscriptions of the various Federal Reserve Banks were, which make up their parts of the capital stock are not revealed.

Their subscriptions were required to be equal to one-half of their undisclosed surpluses on January 1, 1933.

One-half of their subscriptions was required to be paid at the time of subscribing; the other half was left subject to the call of the directorate of Respondent. How the whole amount subscribed for by the banks compares with the one hundred and fifty million dollars appropriated as the Government's share, is not shown, and cannot be known without knowing what the surpluses of the banks were on January 1, 1933. Sec. 264 (d), Title 12, U. S. C. A.

Since the parts of the subscriptions subject to call were enforceable obligations, they were a part of the capital stock, not owned by the Federal Government (Title 12, Sec. 264 (d), U. S. C. A.). The amount cannot be learned from the record. See 14 Corpus Juris, p. 383.

The District Court held (1) that the controversy did not arise under the constitution nor laws of the United States and the court therefore had no jurisdiction of the proceeding; and (2) that if it did have jurisdiction, the court, out of comity ought not to exercise it, for the reason that the claim of respondent against the assets of the Nevada Trust Company (together with all incidents of that claim) had been theretofore presented to the State Circuit Court of Vernon County, Missouri, and should be maintained only in that Court (R. 41).

The Circuit Court of Appeals for the Eighth District to which the case was appealed by Respondent reversed the District Court on both the foregoing grounds and gave Respondent judgment for the fund in Escrow.

We submit that the Circuit Court of Appeals has erroneously determined, either expressly or by necessary implication, questions of pleading, of jurisdiction and of fundamental law involved in the case, which are of such general importance as to be invested with a public interest; that the ruling is in conflict with opinions of other Fed-

eral Courts and of the Supreme Court; and that the ruling involves questions not heretofore determined, yet which are of such vitality to the harmony of the law, as to address themselves to the supervisory jurisdiction of the Supreme Court.

BASIS OF JURISDICTION.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a), and under Title 28, Sec. 377, U. S. C. A., and under Rule 38 of the Revised Rules of the Supreme Court of the United States.

The opinion and judgment of the Circuit Court of Appeals herein were filed on February 18, 1946 (R. 88-98). The Petitioners filed their Petition for a Rehearing on March 25, 1946 (R. 101-109) the time for filing having been extended to that date by order of the Circuit Court of Appeals made March 4, 1946 (R. 99), which petition was denied April 2, 1946 (R. 111). On April 11, 1946, the Circuit Court of Appeals stayed the Mandate for sixty days pending Petitioner's application for writ of Certiorari (R. 111).

QUESTIONS PRESENTED.

I.

Did not the Supreme Court of the United States, instead of the Circuit Court of Appeals, have jurisdiction of any appeal which Respondent might have taken from the United States District Court; and should not the opinion of the Circuit Court of Appeals, therefore, be quashed, under Sec. 349a, Title 28, U. S. C. A.?

II.

Does not Respondent's amended complaint (R. 12) together with the amendment (R. 44) fail to meet the requirement of Rule 8, (a), (1) of the Rules of Civil procedure for the District Courts of the United States, which provides:

"A pleading which sets forth a claim for relief * * * shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends."

Paragraph I of the amended complaint which attempts to state the jurisdictional basis provides:

"That it is a corporation duly organized and existing under and by virtue of an act of congress of the United States, known as Section 264, Title 12, U. S. C., with its principal place of business in Washington in the District of Columbia (R. 44), and the Federal Government owns more than one-half of the capital stock of the corporation. Under sub-section (j) of the statute aforesaid, the cause is deemed to arise under the laws of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand (3,000) dollars."

(a) Except for the plea of the jurisdictional amount in the foregoing paragraph, has not respondent merely identified itself as a corporate entity without respect to the jurisdiction of the District Court; and merely stated what the Congress has said with respect to its cause of action; instead of having pleaded in positive and unequivocal terms that the cause of action arises under the laws of the United States.

(b) Is it not a judicial question whether Respondent's claim arises under the laws of the United States; and is not the congressional declaration of sub-section

(j), fourth, *supra*, an unwarranted invasion of the judicial power, as held by the District Court (R. 37-39); and void? (Sec. 2, Art. III, U. S. Constitution).

(c) Has not the Circuit Court of Appeals, wrongfully held that sub-section (j), fourth, *supra*, fixes the jurisdiction in this case; and thereby wrongfully admitted the authority of Congress to determine this judicial question for the Courts? The Court, quoting the Provision said (R. 90):

‘All Suits of a civil nature at common law or in equity to which the corporation (in its own capacity) shall be a party, shall be deemed to arise under the laws of the United States.’ This special provision reasonably can only mean that all suits to which the corporation is a party in its own capacity must legally be regarded as arising under the laws of the United States, within the jurisdiction granted to the Federal District Courts by Sec. 24 (1) (a) of the Judicial Code, 28 U. S. C. A., Sec. 41 (1) (a).”

(d) Yet, if sub-section (j), *supra*, is of no effect in fixing the jurisdiction of the case, as indicated in note 1 (R. 90) of the opinion of the Circuit Court of Appeals, then is not Respondent’s amended complaint simply bereft of any affirmative showing of jurisdiction in the District Court, as required by Rule 8 (a) (1); and did not the Court disregard the Rule in locating the jurisdiction, in Title 28, Secs. 41 and 42, U. S. C. A., which Respondent had not pleaded? (R. 90-91.)

III.

Has not the Circuit Court of Appeals misunderstood Sec. 42, Title 28, U. S. C. A., in further resting the jurisdiction on Sec. 41 (1) (a) Title 28, U. S. C. A.,

in virtue of the rule in the case of *Osborn v. Bank of the U. S.*, 9 Wheat. 738, 22 U. S. 738, 6 L. Ed. 204? (R. 90-91.)

(a) Does not Sec. 42, Title 28, U. S. C. A., altogether abolish the rule of the *Osborn* case, except as to Federal corporations in which the incorporating Statute, itself, shows that the government of the United States owns more than one-half of the capital stock, and that the corporation is an agency of the United States?

(b) Has not the Circuit Court of Appeals mis-read the case of *Gully v. First National Bank of Meridian*, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70; and has not that case held that the mere fact of federal incorporation is not longer available as a basis of jurisdiction of the District Courts; but rather the nature of the cause of action itself must involve some provision of the constitution or law of the United States, aside from the Federal law of incorporation?

IV.

Has not Respondent, in merely pleading that the Federal Government owns more than one-half of its capital stock, instead of pleading the facts from which the ownership may be determined, pleaded only a conclusion of law, instead of an ultimate fact?, and is not the pleading as such condemned, by *Kvos v. Associated Press*, 299 U. S. 629, 1. c. 279, and by *McNutt v. General Motors Acceptance Corporation*, 298 U. S. 178, 1. c. 181?

(a) Did the Supreme Court in making Rule 8 (1) requiring that a complaint should "contain a short and plain statement of the grounds upon which the (district) court's jurisdiction depends," intend to abandon the all but universal requirement that a complaint should plead the ultimate facts, instead of legal conclusions?

(b) Does not the record fail to sustain the holding of the Circuit Court of Appeals that:

"The Federal Deposit Insurance Corporation is a Federal Corporation and is one in which the Government owns more than one half of the capital stock" (R. 90),

there being no evidence of ownership except the affidavit of the Secretary, E. F. Downey (R. 76), which merely shows the number of shares issued to the Government and the aggregate number issued to the Federal Reserve Banks, without showing how many shares the banks had subscribed for?

V.

Although the Congress declared in the act of incorporation that Respondent's law suits should "be deemed to arise under the laws of the United States," does not the proviso of the incorporating act, Title 12, Sec. 264 (1) (7), withdraw Respondent's causes of action arising out of the assets of state banks in liquidation, from the District Courts, and refer them to the jurisdiction of the States, as to Courts, procedure and substantive law? The proviso is:

"Provided that the rights of depositors and other creditors of any State bank shall be determined in accordance with the applicable provisions of State law."

VI.

Were not the assets which were placed in the hands of Petitioner Woody Swearingen, still unadministered, notwithstanding the order of the State Circuit Court (R. 68), and the escrow agreement (R. 62) and therefore subject to the jurisdiction of the State Circuit Court?

(a) Did the State Court have authority under the Missouri Statutes, Art. 1, Ch. 39, R. S. Mo., 1939, to divest itself of jurisdiction of any of the assets before final liquidation and distribution?

(b) Is it not the assets of a bank in liquidation which are under the control of the Missouri State Circuit Court, under the Missouri law, *supra*, and under the proviso of Title 12, Sec. 264 (1) (7), and are not all claims irrespective of their nature, whether for interest or otherwise, which go against the assets, within that jurisdiction?

(c) Should not the Circuit Court of Appeals, therefore, have given effect to the rule of comity, as did the District Court, and have affirmed the dismissal by the District Court?

VII.

Since the incorporating act, Title 12, Sec. 264 (1) (6), U. S. C. A., limits the obligation of Respondent to pay to depositors the insured deposits in a bank which "has been closed on account of inability to meet the demands of its depositors," and since the Respondent's amended complaint and the evidence shows (R. 12 and 64) that the Nevada Trust Company was closed, not on account of any failing condition, but at the wrongful instigation of Respondent, should Respondent be allowed to take advantage of its own wrong and collect interest, as for money withheld?

(a) Should not this case be distinguished from the case of *Federal Deposit Insurance Corporation v. Farmers Bank of Newtown*, 180 S. W. 2d 532 (Mo. App.), relied on by the Circuit Court of Appeals (R. 95), for in that case no question was raised with respect to that bank's having been lawfully closed?

(b) Is not the opinion of the Court of Appeals in *FDIC v. Farmers Bank of Newtown*, 180 S. W. 2d 532, relied on by the Circuit Court of Appeals as an expression of the Missouri law governing the disposition of the fund in escrow, in conflict with the opinion of the Supreme Court of Missouri in *State ex rel. Moberly v. Sevier, Judge*, 337 Mo. 1174, 88 S. W. 2d 254, holding that Art. 1, Ch. 39, R. S. Mo., 1939, furnishes a complete and exclusive remedy for the disposition of claims against the assets of banks in liquidation?

VIII.

In excluding interest and costs in fixing the jurisdictional amount of a claim in the United States District Court, does not Sec. 41 (1), Title 28, U. S. C. A., exclude any claim for interest alone, where the interest does not arise by contract but only as an incident to the principal as a penalty for its non-payment, and where the principal upon which the interest is claimed to arise is shown by the complaint to have been reduced to judgment and paid?

IX.

Has not the opinion of the Circuit Court of Appeals violated those principles and rules of procedure which do not allow a Respondent to recover its principal in a State Court, and thereafter to recover interest thereon in the Federal Court to the vexation of both the Court and defendants as held in

Melvin v. Hoffman, 290 Mo. 464, l. c. 492, 235 S. W. 107, and cases therein cited;

Stewart v. Barnes, Exc., 153 U. S. 456;

Pacific Railroad v. United States, 158 U. S. 118;

and do not those cases deny the right of Respondent to recover in this suit, interest which was a mere incident to

the principal allowed and recovered in the liquidation proceedings on approval of the State Circuit Court?

REASONS RELIED ON FOR ALLOWING THE WRIT.

The affairs of respondent, Federal Deposit Insurance Corporation, are so extensive, yet its organization is so comparatively recent, and the body of the law, therefore, specially affecting it has received such little construction, that any opinion of the Federal courts defining its rights in any particular, are likely to be of importance to the public; likewise, the rules of procedure for the United States District Courts are of such extensive effect, that any construction of them with respect to the jurisdiction of the District Courts is also of much general importance. Both are involved in this application for certiorari.

I.

The First Question Presented—Jurisdiction.

The District Court dismissed the suit because it considered that the court had no jurisdiction of the case. It thereby rejected the plea of respondent's amended complaint that under Sub-section (j) fourth of Sec. 264, Title 12, U. S. C. A., that

"The cause is deemed to arise under the laws of the United States."

as being without efficacy, holding that the Congress was without power to determine a judicial question for the courts. The holding is in effect that Sub-section (j) *supra* is unconstitutional.

Title 28, Sec. 349a U. S. C. A., provides:

"In any suit or proceeding in any court of the United States to which the United States, or any

agency thereof, * * * is a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit" * * *.

If the Federal Incorporating Act has made of respondent an agency of the United States, then it appears that the appeal from the District Court should have been taken directly to the Supreme Court instead of the Circuit Court of Appeals; and the opinion of the Circuit Court of Appeals should be quashed for want of jurisdiction.

II.

The Second Question Presented—Defective Complaint.

(a) The first sentence of the paragraph of the Amended Complaint quoted under question II, standing alone, does no more than to identify respondent as a corporate entity, and contributes nothing as a basis for jurisdiction in the District Court. The next sentence stating that the cause is *deemed* to arise under the laws of the United States, is but a statement of what the Congress has said about the cause of action. It is not a statement that the matter in controversy arises under any law of the United States. The Supreme Court has interpreted Rule 8 (a) (1) in submitting "Form 2" for pleading jurisdiction. The form is as follows:

"The action arises under the Act of ____, ____, Statute ____; U. S. C., Title ____, No. ____, as hereinafter more fully appears."

(b) There can be little question that jurisdiction of respondent's claim addresses itself to the courts; and that the Congress cannot thrust respondent's cases into

the jurisdiction of the Federal courts by a mere declaration that all Respondent's causes of action shall be deemed to arise under the laws of the United States. The Congress can only withhold from or confer the jurisdiction of cases on inferior courts, if those cases otherwise are within the judicial power of the United States. The District Court stated the matter quite clearly (R. 39). Article III, Section 2, of the United States Constitution.

(c) We have set out the holding of the Circuit Court of Appeals, giving its interpretation that Sub-section (j) "must legally be regarded as arising under the laws of the United States." Surely the court has regarded the Congressional declaration as binding upon the courts instead of being invalid, if the statement of the court is not destroyed by Note 1 of the opinion (R. 90). The Circuit Court of Appeals therefore must be in error in upholding Sub-section (j) fourth as constitutional.

(d) If the effect of Note 1 of the opinion of the Circuit Court of Appeals is such as to reject the validity of Sub-section (j), fourth, *supra*, the respondent's amended complaint is without any jurisdictional averment, and the Circuit Court of Appeals should have affirmed the dismissal of the District Court. If a complainant misunderstands the law and pleads a statute that does not confer jurisdiction, then the pleading should fail, else Rule 8 (a) (1) is of little worth; for the court in locating the jurisdiction under a statute not pleaded might as well have done so without any rule at all.

III.

The Third Question Presented—Sec. 42, Title 28, U. S. C. A.

(a) The first sentence of this statute abolished the rule of the case of *Osborn v. Bank*, 9 Wheat. 738, 22

U. S. 738, in which it was held that a cause of action of a Federal corporation arose under the laws of the United States by the mere fact of Federal incorporation. The second sentence providing that the Act shall not apply to those Federal corporations wherein the government owns more than one-half of the capital stock, does not restore the rule of the Osborn case to all corporations in which the government may own more than one-half of the capital stock. The exemption of the statute applies only to those corporations in which the acts of incorporation themselves show or provide that the government shall own more than one-half of the capital stock. The Congress must have had in mind a class of corporations which stood as agencies of the United States, and not any and all Federal corporations irrespective of their functions, and of the changing ownership of the evidences of their capital stock; so that today a Federal corporation might have access to the Federal courts, and tomorrow, because of changing ownership of capital stock, it might lose that access. The Statute can serve no governmental purpose by being so interpreted, and such an interpretation must convict the Congress of the merest caprice in enacting the Statute. The courts have not had occasion to pass upon the meaning and purpose of this statute, although some of their opinions have commented on the statute, and stated as a matter of dictum that the rule of the Osborn case was applicable.

Nor does the provision of Title 12, Sec. 264 (j) fourth, U. S. C. A., that respondent "may sue, complain and defend, in any court of law or equity, state or Federal," have any jurisdictional force, against the holding in the case of *Bank of the United States v. Deveaux et al.*, 5 Cranch 61, as follows:

"This power, if not incident to a corporation, is conferred by every incorporation act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation in any court which would by law, have cognizance of the cause if brought by individuals.

If jurisdiction is given by this clause to the Federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be. * * *

The court then is of the opinion that no right is conferred on the bank by the act of incorporation to sue in the Federal Courts."

(b) We submit that the Circuit Court of Appeals has misunderstood the case of *Gully v. First National Bank of Meridian*, 299 U. S. 109, l. c. 112-114, 57 S. Ct. 96, 81 L. Ed. 70 (R. 91). That case is very clear in holding:

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends * * * the Federal nature of the right to be established is decisive—not the source of the authority to establish it."

The *Gully* case, *supra*, is the last expression of the Supreme Court. The rule of the *Osborn* case is superseded by its rule. See also *Fed. Sav. & Loan Ins. Corp. v. Third Nat'l Bank of Nashville*, 60 Fed. Supp. 110.

IV.

The Fourth Question Presented—Ownership of Stock.

The plea of the amended complaint that the government owns more than one-half of the capital stock of respondent is a mere legal conclusion, and as such should be disregarded. The capital stock of a corporation is the property of the corporation.

Georgia R. R. and Banking Co. v. Wright, 132 Fed. 912.

Powers v. Detroit and Grand Haven Railway, 201 U. S. 543, 1. c. 559.

Wright v. Ga. R. R. and Banking Co., 216 U. S. 420.

The ownership of the capital stock or property, of a corporation, of course, is owned by the corporation itself. Therefore, the expression in the Statute, Sec. 42, Title 28, U. S. C. A., with respect to the ownership of more than one-half of the capital stock by the Federal Government must refer to the equitable right in and to the property of the corporation, according to the paper evidences thereof, such as stocks, notes, bonds, grants, which would indicate an investment therein by the Federal government. Since the property of a corporation which makes up its capital stock may not include all the property, such as declared but unpaid dividends and sinking funds, and since the varied properties may be of divergent values, and the evidences of interest therein may be so varied, it is but a conclusion of a pleader to say that one owns more than one-half of the capital stock. The facts lie buried in the conclusion which the pleader imposes upon the court with the facts concealed from the court. The Supreme Court, even under the new rules, including

Rule 8a has held that a complaint must state facts, not conclusions.

Kvos, Inc., v. Associated Press, 299 U. S. 269, l. c. 279.

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, l. c. 181.

See also *Fed. S. & L. Ins. Corp. v. Third Nat'l Bank*, 60 Fed. Supp. 110, l. c. 117.

The Federal district courts and the circuit courts of appeals have held almost every conceivable way on the question, and we will not presume to submit a list of their cases in view of the foregoing citations from the Supreme Court.

The holding of the Circuit Court of Appeals in this case that,

"The Federal Deposit Insurance Corporation is a Federal corporation and is one in which the government owns more than one-half of the capital stock" (R. 90).

is without support of the amended complaint, and the evidence of E. F. Downey (R. 76), does not show that the government owns more than one-half of the capital stock; but merely shows that more Class A stock had been issued to the Government than Class B stock to the Federal Reserve Banks, without reference to the amount of stock actually subscribed by the banks, the amount of their subscriptions in dollars and cents not being disclosed by the act nor the record.

V.

The Fifth Question Presented—Title 12, Section 264, (1) (7) Proviso.

The foregoing proviso which we have quoted under our Question 5 has withdrawn from the district courts

Respondent's causes of action, which arise out of liquidation proceedings in the case of State banks. They shall be determined in accordance with the applicable provisions of State law. Art. 1, Ch. 39, R. S. Mo., 1939, has furnished a complete and exclusive remedy for the liquidation of State banks. Since the foregoing proviso is without qualification, there is no reason why it does not refer this case to the Missouri law, *supra*, both as to the court, the procedure and the substantive law. Such was the holding of the district court (R. 38).

State ex rel. Moberly v. Sevier, Judge, 337 Mo. 1174, 88 S. W. 2d 154, and authorities therein cited.

VI.

The Sixth Question Presented—Jurisdiction of the State Circuit Court.

Under Art. 1, Ch. 39, R. S. Mo., 1939, Liquidation proceedings of a State bank are under the supervision of the Missouri circuit court of the county where the bank is located. That supervision is not by virtue of the common law or equity powers of the court, but is the result of the foregoing statute. The jurisdiction continues until all claims are paid, and the assets are finally distributed. The statute does not give the court authority to divest itself of jurisdiction until the final conclusion of the proceeding. The escrow agreement under which the fund in controversy is being held had the approval of the circuit court (R. 22 and 68), but neither the agreement nor the order of the court completed the liquidation. The claim for interest which was rejected by the finance commissioner, and which is the basis of this suit, was not disposed of, and the assets which went into the escrow fund were not finally distributed. The district court therefore was cor-

rect in holding that if the Federal Court had jurisdiction, it should not exercise it and that as a matter of comity, the claim of respondent properly belonged in the State Circuit Court, and was correct in dismissing the case.

State ex rel. v. Sevier, 337 Mo. 1174, 88 S. W. 2d 154, and cases therein cited.

VII.

The Seventh Question Presented—Wrongful Closing of the Bank.

The Nevada Trust Company was not closed because of inability to meet the demands of its depositors. Neither the pleadings nor the record anywhere show that this bank was insolvent nor in any way unable to meet its obligations. But it was closed at the wrongful instigation of respondent because of its dissatisfaction with the management. The evidence is undisputed (R. 65). Since the bank was involuntarily closed, without fault of the management, but at the fault of respondent, respondent ought not to be allowed to take advantage of its own wrong, and collect interest, as for money wrongfully withheld from it although it had a right to collect the deposits themselves, under its assignments. The act of incorporation of respondent, Title 12, Sec. 264 (1) (6), U. S. C. A., limits respondent in the payment of insured deposits to deposits in those banks which have been closed "on account of inability to meet the demands of depositors." If respondent may recover in this case when that condition was not present in the Nevada Trust Company, the respondent will have been given quite a free rein in being high-handed in dealing with insured banks.

Tredegart v. Seaboard Airline Ry., 183 Fed. 289.

Thomas v. Car Co., 149 U. S. 95, 37 L. Ed. 663.

The case of *Federal Deposit Insurance Corporation v. Farmers Bank of Newtown*, 180 S. W. 2d 532 (Mo. App.), involved a bank in which no question was made as to the proper closing. We submit, however, that the case is in conflict with *Federal Deposit Insurance Corporation v. Citizens State Bank of Niangua*, 130 F. 2d 102, l. c. 105, and with *State ex rel. v. Sevier*, 337 Mo. 1174, *supra*, and that the Circuit Court of Appeals was wrong in considering that the case expressed the Missouri law.

PRAYER

For the foregoing reasons, your petitioners pray a Writ of Certiorari issue out of this Honorable Court to the United States Circuit Court of Appeals for the Eighth Circuit commanding it to certify and send to this court on a date to be designated a complete transcript of the record and the proceedings in the Circuit Court of Appeals had in this case, that this case may be reviewed and determined by this court; that the judgment of the Circuit Court of Appeals be quashed or reversed; and that your petitioners be granted such other and further relief as to this Honorable Court may seem meet and proper.

Dated June 5, 1946.

B. C. HOWARD,
911 Commerce Building,
Kansas City 6, Missouri,
Attorney for Petitioners.

HARRY HOWARD,
230 Dierks Building,
Kansas City 6, Missouri,
Of Counsel.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

I.

OPINION OF COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is reported in 153 F. 2d at Page 591 and appears on pages 88 to 98 of the transcript of the record filed herein.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a), and under Title 28, Sec. 377, U. S. C. A., and under Rule 38 of the Revised Rules of the Supreme Court of the United States.

The opinion and judgment of the Circuit Court of Appeals herein were filed on February 18, 1946 (R. 88-98). The Petitioners filed their Petition for a Rehearing on March 25, 1946 (R. 101-109), the time for filing same having been extended to that date by order of the Circuit Court of Appeals made March 4, 1946 (R. 99), which petition was denied April 2, 1946 (R. 111). On April 11, 1946, the Circuit Court of Appeals stayed the Mandate for sixty days pending Petitioner's application for Writ of Certiorari (R. 111).

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Eighth Circuit erred:

1. In assuming jurisdiction of the Appeal in this case.
2. In reversing the judgment of the District Court in this case.
3. In assuming jurisdiction and deciding the case on its merits and in remanding the case to the District Court with directions.

STATEMENT.

We believe we have made an adequate statement of this case in our Summary Statement in the foregoing petition. We, therefore, adopt that statement to avoid repetition.

In the brief following, we have not endeavored to discuss the questions submitted in our petition in the order in which they have been presented. We are not undertaking to discuss all of those questions, believing that we have suggested enough reasons and authorities in the reasons relied on for allowing the Writ, to suggest the worth of the issues presented in the Petition. We, therefore, make only a few suggestions and cite and discuss only a few authorities.

ARGUMENT.

POINT I.

The appeal in this case should have been direct to the United States Supreme Court. The Circuit Court of Appeals had no jurisdiction.

Respondent contended in its brief in the Circuit Court of Appeals that the FDIC was an agency of the United States. If this is true then the jurisdiction of the appeal was direct to the Supreme Court under Sec. 349a, Title 28, U. S. C. A.

Judge Otis held in the trial court that the provision of Sec. 264 (j-fourth), Title 12, U. S. C. A., "All suits of a civil nature at common law or in equity to which the corporation shall be a party shall be deemed to arise under the laws of the United States"—was unconstitutional where the Federal law was in nowise involved (See 55 Fed. Supp. 921).

Jurisdiction of the appeal from that decision could not be in two courts. If respondents are correct and the FDIC is an agency of the government then the appeal was direct to the Supreme Court under Sec. 349a, Title 28, U. S. C. A., *supra*. If that section applies then the Circuit Court of Appeals had no jurisdiction of the appeal in this case (*Hoffman v. McClelland*, 284 Fed. 837; *United States v. John*, 155 U. S. 109, 15 S. Ct. 39, 39 L. Ed. 87; *Great Northern Railroad v. Blaine County*, 252 Fed. 548), and its decision should be quashed. *Stratton v. St. Louis Southwestern Ry. Co.*, 51 S. Ct. 8, 282 U. S. 10, 75 L. Ed. 135.

POINT II.

The decision herein holding that the Federal Court has jurisdiction of this action is in violation of Section 2 of Article III of the United States Constitution, authorizing the Federal Courts and defining their jurisdiction.

Article III, Section 2, provides "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority." No contention is made in this case of any ground of jurisdiction except that the case arises under the laws of the United States.

There is no constitutional provision and no statute giving Federal Courts jurisdiction of cases because a Federal Corporation is a party. That rule arises from Court decisions only. The parent case is *Osborn v. Bank*, 9 Wheat. 739. In the original cases the Federal laws were really and substantially involved but the jurisdiction was declared to arise because a corporation created by Federal law was a party. However, in time cases came into the Federal Courts where corporations organized under Federal laws were parties but no Federal question or issue under the Federal laws were in anywise involved. The United States Supreme Court then reconciled the language of the older cases in which it was stated that the jurisdiction vested solely by the fact that a Federal Corporation was a party to the suit and while they said that the old cases were not overruled (because in those cases a Federal question was actually involved) they did, however, go a step further and said that in addition to being a Federal Corporation a federal question must also be substantially involved as an essential element of the case. But in *Gully v. First National Bank*, 299 U. S. 109, 57 S.

Ct. 96, 81 L. Ed. 70, a national bank was a party and contended that such fact gave the Federal Courts jurisdiction, and this court said:

"How and when a case arises 'under the Constitution or laws of the United States,' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action (Authorities). The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another (Citing authorities). A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (Citing Authorities), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal (Authorities). Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense (Authorities).

Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an Act of Congress (Citing *Osborn v. Bank*, 9 Wheat. 738; *Pac. R. R. Removal Cases*, 115 U. S. 1). Modern Statutes have greatly diminished the importance of those decisions by narrowing their scope (Authorities). Federal incorporation is now abolished as a ground of federal jurisdiction, except where the United States holds more than one-half of the stock. * * * Partly under the influence of statutes disclosing a new legislative policy, partly under the

influence of more liberal decisions, the probable course of the trial, the real substance of a controversy, has taken on a new significance. 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends' (Authorities). Only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them (Authorities). 'We should fly in the face of this legislative policy and disregard precedents which we think controlling were we to extend the doctrine now.' *Ibid.* Today, even more clearly than in the past, 'the federal nature of the right to be established is decisive—not the source of the authority to establish it.' *Ibid.*"

That statute, Sec. 42, Title 28, U. S. C. A., does not say that when the Federal Government owns more than half the stock, the Federal courts shall have jurisdiction in every case where that corporation is a party. It grants no jurisdiction whatever and under the United States Constitution (Section 2, Article III) the judicial power of the Federal government does not extend to any case that does not arise under the Federal laws, *i. e.*, in the absence of the other stated grounds of Federal jurisdiction, as in this case. Whether the Federal Court has jurisdiction in any case to which a Federal Corporation in which the United States owns more than half the stock, happens to be a party, must still be determined according to the law declared by the United States Supreme Court. *Gully v. First National Bank, supra*, is the last controlling decision of that court. It must now be determined as a fact that in addition

to the Federal incorporation and ownership of stock, "a right or immunity created by the constitution or laws of the United States, must be an element, and an essential one of the plaintiff's cause of action." Congress has no power to extend the judicial powers of the Federal Courts beyond the powers granted in the United States Constitution.

POINT III.

Sec. 41 (1), Title 28, U. S. C. A., gives the Federal Court jurisdiction, "Where the matter in controversy exceeds exclusive of interest and costs the sum of \$3,000 and (a) arises under the constitution or laws of the United States or treaties made, or which shall be made under their authority.

The complaint shows that this is an action to recover interest only, which is claimed as due under the Missouri Law as compensation for non-payment of a certain principal amount, a judgment for which has already been recovered in the State Court and paid.

In *Fed. Dep. Ins. Corp. v. Citizens Bank*, 130 F. 2d 102, l. c. 105, the court held that the claim for interest now set up in the case at bar, was a claim for interest incident to the principal and could only be litigated and allowed in the court where the principal was allowed.

The prior Missouri decisions and the Federal decisions are in accord on the proposition that where interest does not arise by contract but accrues solely by statute as an incident to the non-payment of the principal a separate action cannot be maintained to recover the interest.

Arnold v. Sedalia National Bank, 74 S. W. 1038, 100 Mo. App. 474; *Stone v. Bennett*, 8 Mo. 42; *Graves v. Saline County, Illinois*, 104 Fed. 61; *Hammond v. Carthage Sul-*

phite Pulp and Paper Co., 34 F. 2d 157; *Stewart v. Barnes, Extr.*, 38 L. Ed. 781, 153 U. S. 456; *Pacific Railroad v. United States*, 158 U. S. 118, 15 S. Ct. 766, 39 Law Ed. 918; *United States v. Steinberg*, 100 F. 2d 124.

This rule was never departed from in Missouri until *Federal Deposit Insurance Corporation v. Farmers Bank of Newtown*, 180 S. W. 2d 532. This decision of the Kansas City Court of Appeals brushes aside the established Missouri law settled by controlling decisions of the Missouri Supreme Court without citing any authority therefor. The court says that the payment of the principal is a bar to recovery of the interest where the interest is not due by the terms of a contract but such rule has no application in bank insolvency proceedings; but it cites no competent Missouri authority for that statement.

In the old cases where interest was allowed in insolvency proceedings the interest was always contract interest that was accruing at the date of the insolvency. That rule has been extended in decisions allowing statutory interest accruing as a penalty for non-payment pending the court proceedings, but the point that the debtor's hands were tied by the law and the penalty cannot be assessed in such case was not raised, discussed or determined in any of the cases.

In *Kirrane v. Boone*, 66 S. W. 2d 861, 334 Mo. 558, the Supreme Court of Missouri declared that the Missouri statutes regulating bank liquidation proceedings provided an exclusive method of winding up the affairs of a subject bank. That special statute allows depositors no interest during the pendency of the liquidation proceedings but expressly limits the recovery, of the FDIC to the face amount of the dividends that would have been payable to the depositors, "until such dividends shall equal the insured deposit liability to such depositor."

See Sec. 8024 (16), R. S. Mo., 1939. Claims not filed are absolutely barred under the Supreme Court decisions. *Commerce Trust Company v. Farmers Exchange Bank*, 61 S. W. 2d 928; *Harney v. Peoples Bank*, 136 S. W. 2d 273 (Syl. 5).

Under the decisions of the Missouri Supreme Court the claim for interest is merged in the judgment for the principal which is *res adjudicata* as to the interest and the interest cannot afterwards be pleaded and set up as a separate claim because every judgment is *res judicata* not only as to all matters which were raised but as to all matters which might have been litigated in the former action.

Wickersham v. Whedon, 33 Mo. 561; *Powell v. Joplin*, 73 S. W. 2d 408, 335 Mo. 562; *Cordia v. Mathes*, 130 S. W. 2d 597, 344 Mo. 1059; *State ex rel. v. Hughes*, 148 S. W. 2d 576, 347 Mo. 549; *In re Orth's Estate*, 169 S. W. 2d 401, and cases cited; *Hunter v. Delta Realty Co.*, 169 S. W. 2d 936, 350 Mo. 1123.

See also *Baird v. United States*, 96 U. S. 430, 24 L. Ed. 703; *Gunter v. Atlantic Coast Line Railroad*, 200 U. S. 273, 50 L. Ed. 477, 26 S. Ct. 252; *Continental National Bank v. Holland Banking Company*, 66 F. 2d 823; *Kithcart v. Metropolitan Life Ins. Co.*, 119 F. 2d 497.

This rule was firmly established and strictly applied in Missouri both as to recovery of interest and as to bank liquidation proceedings. See *Broyles v. Achos*, 78 S. W. 2d 459 (Syl. 3), and *Citizens Security Bank of Englewood v. Gatewood*, 36 S. W. 2d 426; *Wickersham v. Whedon*, 33 Mo. 561.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its Supervisory powers in granting a Writ of Certiorari and thereafter reviewing and reversing the opinion and judgment of the United States Circuit Court of Appeals, Eighth Circuit.

Respectfully submitted,

B. C. HOWARD,
911 Commerce Building,
Kansas City 6, Missouri,
Attorney for Petitioners.

HARRY HOWARD,
230 Dierks Building,
Kansas City 6, Missouri,
Of Counsel.

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**Supreme Court of the
United States**

OCTOBER TERM, 1946.

No. 156.

E. M. GEORGE-HOWARD AND WOODY
SWEARINGEN, PETITIONERS,

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENT.

REPLY BRIEF OF PETITIONERS ON CERTIORARI.

↓ B. C. HOWARD,

911 Commerce Building,
Kansas City 6, Missouri,

Attorney for Petitioners.

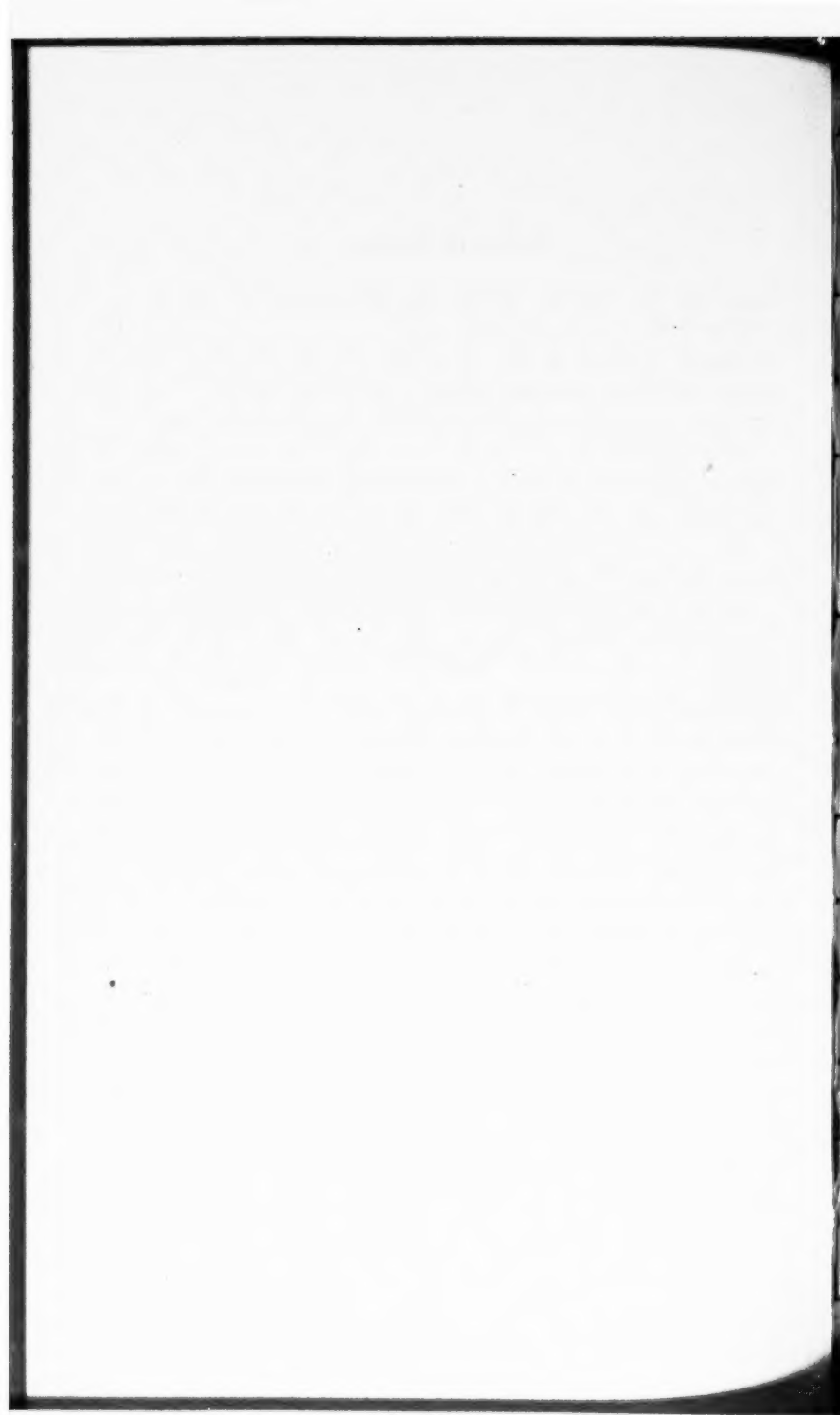
HARRY HOWARD,
230 Dierks Building,
Kansas City 6, Missouri,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 156.

E. M. GEORGE-HOWARD AND WOODY
SWEARINGEN, PETITIONERS,

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENT.

REPLY BRIEF OF PETITIONERS ON CERTIORARI.

Although the statement beginning on page 2 of the Answer Brief of Respondent is a fair summary of the proceedings below, yet we are constrained to call attention to some of the statements therein.

Counsel have stated at page 2 of their brief, that "more than one-half of the capital stock of the FDIC is owned by the government of the United States (R. 76, 77)." The record reference is to the affidavit of E. F. Downey, Secretary of the FDIC, showing the amount of capital stock which had been issued respectively to the

government of the United States and to the reserve banks. We have challenged this statement in number IV of the questions presented in our petition for a writ of certiorari.

On page 3 of the Answer brief, the statement is made that "on December 2, 1937, the bank was closed by its directors," etc. Record 56 and 65 cited do not support the statement. On the contrary, Record 65 shows that the bank was closed at the instigation of Respondent for no reason which the law creating the FDIC sanctions. This matter is the subject of Point VI of the petition for a writ of certiorari.

The indication on page 5 of their statement that the liquidation of the Nevada Trust Company terminated on the deposit of the trust fund with petitioner, Wooddy Swearingen, is the subject of question VI in the petition for certiorari, wherein we contend that the liquidation proceeding was not then concluded.

Counsel for Respondent have undertaken to discuss only four propositions contained in the petition for certiorari. The questions which we have presented to the court, yet with which Respondent has not undertaken to deal, we believe should be considered as admitted, and we suggest they alone are sufficient to justify the issuance of the writ. We will deal only with the four propositions they have questioned.

QUESTIONS PRESENTED IN THE PETITION FOR CERTIORARI.

I.

Did not the Supreme Court of the United States, instead of the Circuit Court of Appeals have jurisdiction of any appeal which Respondent might have taken from the United States District Court; and should not the

opinion of the Circuit Court of Appeals, therefore, be quashed under Section 349(a), Title 28, U. S. C. A.?

Since the District Court held that the provision of Title 12, U. S. C. A., Section 264(j), that,

"all suits of a civil nature * * * to which the Corporation shall be a party shall be deemed to arise under the laws of the United States,"

is unconstitutional, the appeal, if any, should have been directly to the Supreme Court under the provision of Title 28, U. S. C. A., Section 349(a). This statute set out at page 21 of Respondent's answer brief, provides:

"In any suit or proceeding in any court of the United States to which the United States or any agency thereof * * * is a party, * * * and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor, or notice thereof, within 30 days after the entry of a final or interlocutory judgment, decree or order; * * *"

Counsel for Respondent have treated the Corporation as an agency of the United States, and there is some support for this consideration in the concurring opinion of Mr. Justice Jackson in the case of *D'Oench, Duhme & Co. v. FDIC*, 315 U. S. 447. Treating Respondent as such agency, then everything was present to suggest that the appeal should have gone to the Supreme Court, instead of the Court of Appeals.

The argument of counsel for Respondent, beginning on page 8 of their brief, that an appeal to the Supreme Court under this statute is merely optional, and that an appellant might appeal either to the Supreme Court under this statute, or to the Circuit Court of Appeals under

other statutes, is not sound. There is nothing elective about this statute in the use of the word "may" instead of "shall," except that it is elective with a defeated litigant merely to appeal or not appeal. The history of the foregoing statute, as indicated by 81 Cong. Rec. 3270, 3272 and 8507, cited by respondent, does not support their contention. The bill was introduced apparently under the belief that the question of the constitutionality of an act of Congress was vested with a public interest, and that the fate of a Congressional act should not be left to the hazard of private litigants. The bill before the Judicial Committee provided that when the constitutionality of an act of Congress was challenged, then the District Court should certify the fact to the Attorney General, and the Attorney General should thereupon have a right to intervene in the case, in order to bring what the committee thought would be a more thorough consideration to the question. The only questions of discretion which were discussed were whether the District Court might use its discretion in notifying the Attorney General, or whether the requirement should be mandatory upon the District Court, leaving it discretionary with the Attorney General as to whether he would intervene in support of the act questioned. The quotation on page 10 of Respondent's brief went only to whether the Attorney General should use his discretion at all in appealing to the Supreme Court; not whether he might appeal to the Supreme Court or the Circuit Court of Appeals.

The provision of the Act, *supra*,

"and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within 60 days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States,"

does not lend support to the thought of an election as between the Supreme Court or the Circuit Court of Appeals. That provision evidently was written in view of the many turns and characters of cases within the limits of the statute. The statute provides an appeal to the Supreme Court "in any suit or proceeding in any court of the United States," etc.

There are quite a number of statutes which provide appeals to the Supreme Court, and fixing different times in which appeals may be taken. Such appeals may in some instances be taken from preliminary orders, interlocutory judgments or decrees or injunctions, according as the exigencies of the cases may suggest, and before there may be any ruling against a Federal statute, or even before a pleading may be filed questioning the constitutionality of a Congressional act. In event of an appeal prior to rulings of the District Court, injecting such a constitutional question into the case, an appeal may, if other circumstances allow, be made to the Court of Appeals; but such an appeal would under this statute be carried to the Supreme Court as a matter of course, in event of a later appeal from a decision holding a Congressional act unconstitutional. Or, if under other statutes allowing appeals to the Supreme Court within sixty days, a litigant should appeal after appeal under the act in question, his appeal would also be to the Supreme Court. The last sentence of the statute as given on page 22 of Respondent's brief provides,

"This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

If the Congress had desired to provide an election as to which court a litigant might go when the constitu-

tional question contemplated by the statute is involved, they surely would have provided in the foregoing sentence that the appeal provided by the section also should not be in derogation of any right of appeal under existing statutes to the circuit courts of appeal. This statute appears to be the only one providing specially for an appeal in cases attacking the constitutionality of Congressional acts. Considering the reasons, as disclosed by the Congressional Record, for enacting the statute, it must be regarded as an act intended to obtain both an expeditious hearing, and one in which the law may be assured of adequate consideration.

The following acts, together with amendments, provide for appeals to the Supreme Court, and they were doubtless in the mind of the Congress in enacting the statute in question.

Section 29, Title 15, U. S. C. A., provides that appeals to the Supreme Court from final decrees may be taken within sixty days, in cases involving monopolies and combinations.

Section 45, Title 49, U. S. C. A., allows appeals to the Supreme Court from final decrees in equity cases in the district courts within sixty days, in transportation cases.

Section 44, Title 49, U. S. C. A. (Called the Elkins Act), provides for an expeditious appeal to the Supreme Court in transportation cases in which the United States is a party.

Section 682, Title 18, U. S. C. A., provides for a writ of error in behalf of the United States from a district court to the Supreme Court within thirty days in criminal cases.

Section 47, Title 28, allows appeals from interlocutory injunctions against orders of the Interstate Commerce Commission, within thirty days.

Section 217, Title 7, U. S. C. A., makes other statutes relating to appeals applicable to certain cases affecting orders of the Interstate Commerce Commission.

Hence it can be seen that the provision that the act in question should not be in derogation of other rights of appeal to the Supreme Court was necessary for the sake of clarity, and to avoid the possibility of conflict.

It does not appear to have been the policy of legislation to allow a litigant to select the appellate court to which he desires to go. And the very nature of the appeal rejects such an elective course. Unlike courts of original jurisdiction in which the institution of a suit in one court is not necessarily to the exclusion of other courts, an appeal to an Appellate Court is exclusive. Otherwise, courts of last resort would be in continual conflict, and the law could not be finally settled with any degree of decent dependability. Furthermore, if a litigant were given an election as to which United States appellate court he might go to the exclusion of other Appellate Courts (as the nature of an appeal demands), then the judicial power of the United States would not be conferred under the Constitution upon the Supreme Court and such inferior courts as Congress may from time to time ordain and establish; but to such an extent of election, would be conferred upon litigants. Such would be absurd. Appellate statutes have provided for appeals to this or that court according to the classes or natures of cases, instead of preferences of litigants.

The whole question of election is ably discussed and fully determined in *Jackson v. Cravens*, 151 C. C. A. 193, 238 Fed. 117. In that case the appeal was from an order of the District Court for the Southern District of Florida, denying an interlocutory injunction applied for by the plaintiffs. The bill was filed

to restrain the Inspector of Naval Stores from taking steps to enforce an alleged unconstitutional statute of that State. The proceeding followed the course required for referring the question to other judges of the Circuit and District Courts. The statute involved provided,

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

The Court said:

"The contention of the plaintiffs (appellants) is that this provision is permissive only, and does not provide an exclusive remedy for an appeal, but that resort may be had at the election of the plaintiffs to the remedy provided in Section 129 of the Judicial Code by appeal to this court. The defendants (appellees) contend that the appellate remedy provided by Section 266 is exclusive.

(1-3) It is conceded by appellees that the terms of section 129 are broad enough to cover this appeal, unless they are to be restricted by the effect of section 266. The appellants also concede the rule of construction that where an earlier statute provides a remedy covering all cases, and a subsequent statute creates a specific remedy for a particular case, the latter is to be construed to be exclusive, unless the purpose of the Legislature or the convenience of the public demand a different rule of construction, and that this is true, though the language of the subsequent act is permissive, rather than mandatory. * * *

For these reasons we see no reason for departing from the settled rule of statutory construction, recognized by the Supreme Court, that the general terms of a prior statute are not to be considered as covering the particular terms of a subsequent statute, but, on the contrary, the latter are to be considered as withdrawn from the operation of the former,

unless for good reason. *United States v. Chase*, 135 U. S. 260, 10 S. Ct. 756, 34 L. Ed. 117; *Townsend v. Little*, 109 U. S. 504, 3 S. Ct. 357, 27 L. Ed. 1012; *Cook County National Bank v. United States*, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537. At the time of the enactment of the act of March, 1891, now represented in part by section 129 of the Judicial Code, and at the time of the adoption of its amendments, no such remedy as that now provided for by section 266 of the Judicial Code was in existence, and Congress could have had no express intention of making the appeal given by section 129 applicable to the new remedy. Section 294 of the Code (Comp. St., 1913, 1271) prevents giving the re-enactment of section 129, when the Code was adopted, a different construction from that which it originally had.

We think the contention of appellants also conflicts with the rule of construction that where a statute provides a new, specific, and complete remedy, and fully covers the subject-matter, the provisions of the statute will be looked to alone, and resort will not be had to prior existing general remedies as cumulative. * * * We think Congress thereby intended to fully cover the subject-matter of appeals from such orders, and that the remedy so provided was exclusive, not cumulative. The rule was laid down by the Supreme Court in the cases of *Brown v. United States*, 171 U. S. 631, 19 S. Ct. 56, 43 L. Ed. 312, and *Laurel Oil Co. v. Morrison*, 212 U. S. 291, 29 S. Ct. 394, 53 L. Ed. 517, that:

'Where a statute provides for an appeal or a writ of error to a specific court, it must be regarded as a repeal of any previous statute providing for an appeal or a writ of error to another court.'

* * * The state and its citizens are also concerned, and this makes a speedy and authoritative

settlement of the question of more importance even than the preservation of the status in the instant case. Giving to the litigants the election to delay such authoritative decision by an appeal to an intermediate court would defeat this purpose.

Because of the views expressed, we are constrained to hold that the appeal provided by section 266, direct to the Supreme Court, is exclusive, and that the appeal to this court should be dismissed, at appellants' costs; and it is so ordered."

II(b).

Is it not a judicial question whether Respondent's claim arises under the laws of the United States, and is not the Congressional declaration of subsection (j) fourth, Section 264, Title 12, an unwarranted invasion of the judicial power as held by the District Court (R. 37, 39) and void?

Respondent predicates its argument in support of the jurisdiction of the District Court upon the thought that the rule of *Osborn v. Bank of the United States*, 9 Wheat. 738, is applicable to those corporations in which the government owns more than one-half of the capital stock and upon its contention that the Government does own more than one-half of the capital stock of the FDIC. We suggested on page 17 of our petition for the writ of certiorari, that the *Osborn* case, *supra*, is no longer controlling in view of the case of *Gully v. First National Bank*, 299 U. S. 109, the latest expression of the Supreme Court. Respondent admits the full effect of the *Gully* case, *supra*, but considers that merely one sentence therein saves the rule of the *Osborn* case for them (Resp. Brief 13). That sentence is, "only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though

within their special field, there was no thought to disturb them." The Circuit Court of Appeals also seized upon this one sentence in holding to the rule of the Osborn case (R. 91). It would be quite interesting for either Respondent or the Circuit Court of Appeals to have attempted to spin out or define the "special field" to which the Osborn case rule is still applicable, against the statement in the Gully case, l. c. 114:

" 'A suit to enforce a right, which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends' * * *. Today, even more clearly than in the past, 'the Federal nature of the right to be established is decisive—not the source of the authority to establish it.' "

The rule of the Osborn case that the causes of action of Federally incorporated companies all arise under the laws of the United States, and therefore, the Federal courts are open to them by the mere fact of their Federal incorporation, is not a constitutional provision nor a legislative act within constitutional limits; but is merely a rule of construction. Like any other rule of construction, it is subject to be overruled, or superseded by later holdings of the Supreme Court. The "special field" in which the *Gully case*, *supra*, left the Osborn case rule applicable must be merely that "field" of cases to which it and successive cases announcing the rule had already been applied. Except for this, we believe the special "field" can have little or no application or meaning.

We suggest again that the rule of the Osborn case is also barred by the statute, Title 28, Section 42, U. S. C. A.,

providing that no district court shall have jurisdiction of any action or suit against a corporation for the mere reason that it was incorporated under an act of Congress. This provision is all embrative. The provision that this statute shall not apply to those Federally incorporated companies wherein the Government of the United States is the owner of more than one-half of their capital stock, can hardly be considered to embrace any and all Federal incorporations, irrespective of their functions, and irrespective of the changing ownership of their shares of stock. If it did extend to them, then today such corporations might have access to the Federal courts in their litigation, and tomorrow, by changing ownership of shares, they would lose that access. As suggested in our petition for the writ, such a construction would convict the Congress of a mere caprice, and such a construction we believe could serve no legitimate exercise of authority either of Congress or of the courts. The statute abolished the Osborn rule, but provided that certain corporations in which the *act of Incorporation itself* fixed a majority of the ownership of the capital stock in the Government, and which stood as an agency of the Government, might still have a right in the Federal courts; the right, however, still being subject to the law as declared in the Gully case, and depending upon an affirmative showing that the statute creating the corporation, provided for a majority ownership of stock in the Federal Government.

IV(b).

Does not the record fail to sustain the holding of the Circuit Court of Appeals that the FDIC is one in which the Government owns more than one-half of the capital stock?

We state again that the affidavit of E. F. Downey, Secretary of the FDIC (R. 76) does not show the majority

of the ownership of the capital stock in the Federal Government. The statute creating the corporation provided an appropriation of \$150,000,000 to be available for capital stock. The affidavit shows that 1,500,000 shares were issued to the Federal Government, of the aggregate value of \$150,000,000, thereby exhausting the appropriation. The statute provided that one-half of the surplus of all the Federal reserve banks should be subscribed for capital stock, and that one-half of the subscription should be paid at the time of the subscription; that the other half might be called for at the behest of the directorate. The affidavit merely shows that \$139,299,556.99 of the money of Federal reserve banks had gone into Class B stock. There is no showing what one-half of the surplus of the Federal reserve banks was.

Realizing that the proof of majority ownership in the Federal Government was wanting, Respondent has attempted to buttress its claim by referring to the annual reports of FDIC to Congress for each year from 1934 (Note 2, pages 12 and 13 of the Answer Brief). These reports show no more than the affidavit of Mr. Downey. They do not show what one-half of the surplus of the Federal Reserve banks amounted to. Since Respondent has turned away from the record, we believe we are justified in furnishing other information. In the 20th Annual Report of the Federal Reserve Board for 1933, at pages 24 and 25 there is shown approximately \$37,000,000 derived from assessments on participating banks, which became a part of the temporary fund of the FDIC. Title 12, Section 264, subdivision (i) (1), U. S. C. A., provides that the Temporary Federal Deposit Insurance fund and the funds for Mutuals, theretofore created, should be consolidated into a permanent insurance fund, and should be held by the corporation for its uses and purposes. Title 12, Section 264 (h) (5), recognizes that the equitable ownership of this

fund is in the contributing banks, and it provides that, instead of the fund being returned to the banks it shall be held, and the contributing banks shall be given credit out of it for assessments, while they continue their participation as insured banks. Section 264 (i) (3), Title 12, U. S. C. A., appears to provide for the return of the proportionate part of this temporary fund upon the withdrawal of a bank from the Federal Deposit system.

If the FDIC were dissolved today, the banks which contributed that fund would be entitled to share ratably in the distribution of the FDIC capital stock or property.

It can be seen from the foregoing that the temporary insurance fund does not inure to the stock of either the Federal reserve banks nor to the stock of the Government; but is confused with the contributions of the Government and of the Federal Reserve Banks, and when the amount of the fund is added to the amount of the Federal Reserve banks' investments, an aggregate of approximately \$180,000,000 of capital stock is shown in the hands of others than the United States. The United States ownership of capital stock is therefore approximately \$30,000,000 less than the capital stock of others.

We have shown in our petition for the writ and the suggestions (page 18), that the capital stock of a corporation is the property of the corporation, and have cited ample authority therein to that effect. The statute, Title 28, Section 42, U. S. C. A., with respect to corporations in which the Government owns more than one-half of the capital stock, should be construed in the light of those opinions; for they express the law at the adoption of the statute. Construing the statute in that light, and laying it alongside the law creating the FDIC, it shows that the Government of the United States is a minority stockholder, and, therefore, not entitled to be in the Federal courts by the mere fact of its Federal incorporation.

On page 13 of the Answer Brief, Respondent refers to Title 12, Section 264 (j) (4), providing that the corporation shall become a body corporate, and as such shall have the power "to sue and be sued, complain and defend, in any court of law or equity, State or Federal." On pages 16 and 17 of our petition and suggestions, we called attention to the case of *Bank of The United States v. Devereaux et al.*, 5 Cranch 61, in which a similar provision in the statute creating the United States Bank of that day, had been held not to broaden the jurisdiction of the Federal courts; but rather that the provision merely expressed the incidental power of the corporation as such to sue in any court on the same basis that an individual might sue. In other words, the provision is but a further recognition of the corporation as being a legal entity. We quoted from the Devereaux case at page 17 of our petition for the writ. We submit that this is a true expression of the law, and is altogether applicable to the statute in question, *supra*. We have found no holding in which this opinion has been overruled. If this Devereaux case does not express the correct rule, then the Congress, by the act which that case construes, would have invaded the judicial power of the United States as placed in the Federal Courts; for the judicial power is to be determined not by the fiat of Congress, but rather by the Courts from the facts and questions presented in suits at law or in equity.

The law creating the FDIC is not involved in this proceeding, and no right to be in the Federal court can rest upon that statute. The FDIC was not within the sanction of the statute creating it in the acts of purchasing the deposits and paying the depositors for them and in presenting its claims in the Missouri Circuit Court. The statute, *supra*, provides for payment of claims, only in

cases of those banks which are unable to meet the demands of its depositors. Neither the pleading nor the record shows that the Nevada Trust Company, whose deposits were purchased by the FDIC was in a failing condition. On the contrary, the record shows (R. 64-65) it was closed for no reason except the mere dissatisfaction of some of the auditors of the FDIC with the management. Without showing any bad financial condition, the record shows threats that if the management were not changed, then the State Finance Commissioner would be prevailed upon to close the bank. There is no statute justifying the action of the FDIC, nor its agents, as far as anything may be discerned from the record. The FDIC at the outset was challenged in this respect. It had a chance to offer evidence showing the bank was in a failing condition, if that had been the fact. It did not do so, although it was exceedingly well represented by counsel. Failing in its evidence, no other conclusion can be reached than that it was "high-handed," in procuring the closing of the bank. It doubtless realized its wrong, for it has based its cause of action altogether upon assignments which it took from depositors. Those assignments were not required under the law of its creation, and do not make a subrogation under the law. Their rights were purely contractual. They merely purchased the claims of the depositors, and presented them for payment, after having contrived to cause the bank to be closed. Their assignments were altogether local. They dealt with the local bank, and their claims were no more than the ordinary assignment of a promissory note or an open account upon which anyone might bring a suit in a local Court, or which any holder might present to the obligee, whether bank or individual. We say again, that since the FDIC acted wrongfully in causing the bank to be closed, then

bought up the claims of the depositors, and presented them for payment, all in sequential action, that it acted wrongfully without the support of the law, either of its creation, or of any other law; and it should therefore not be entitled to recover interest. The hand of the FDIC has been called in this matter throughout. It has attempted to ignore this wrong at all times. It should not be allowed further to escape this proposition.

We refer again to the proviso of Title 12, Section 264 (j) (7), which we set out and discussed at pages 10 and 19 of our petition and suggestions, and suggest that that proviso cast this suit altogether into the lap of the Missouri court.

We also refer to our question VI and suggestions at pages 10 and 20, of our petition and suggestions, with respect to the question of comity, which Judge Otis of the District Court found to be such as to cause him to dismiss the suit, and suggest that under the Missouri law and authority therein cited, that the court could not divest itself of jurisdiction until there had been a final distribution of all the assets, and that the deposit of a part of the assets with the escrow was not a distribution of the assets, so that the liquidation could be considered as terminated. The language of the escrow agreement with respect to bringing a suit over the escrow fund in a court of competent general jurisdiction is no more than the provision of the Missouri statute, Art. 1, Ch. 39, R. S. Mo., 1939, which provides for a timely suit within the Missouri special statutes of limitations in that Chapter, and in which only the Missouri court is allowed to deal with the claim.

We submit that the case of *State ex rel. v. Sevier*, 337 Mo. 1174, 88 S. W. 2d 154, cited at page 12 of our petition and suggestions, is the correct expression of the Missouri law in its holding that the Circuit Court of the

County where the closed bank is located, has the exclusive jurisdiction of all claims against the assets of a bank in liquidation under the Missouri law.

In conclusion, we are thoroughly convinced that the District Court was without jurisdiction to hear and determine the questions involved in this case and that Judge Otis correctly dismissed the case for the reasons set out in his opinion (R. 37), 55 Fed. Supp. 921. We are also convinced that the Respondent was not authorized, in view of Section 349(a), Title 28, U. S. C. A., to appeal to the Circuit Court of Appeals and we are further convinced that the Circuit Court of Appeals was without jurisdiction to hear and determine the case on appeal as jurisdiction on appeal was vested exclusively in the Supreme Court. This contention is fully supported by the holding of the Circuit Court of Appeals, Fifth Circuit, in the case of *Jackson v. Cravens*, 151 C. C. A. 193, 238 Fed. 117. And by the holding of the Circuit Court of Appeals, Third Circuit, in the case of *Safe Harbor Water Power Corporation v. Federal Power Commission*, 124 F. 2d 800, 1 c. 804 (1-4), first paragraph, wherein the holding in *Jackson v. Cravens* is cited with approval and quoted from.

In view of all of which we submit that this Court should grant Certiorari and quash the decision and opinion of the Circuit Court of Appeals and direct the Circuit Court of Appeals to dismiss Respondent's appeal.

Respectfully submitted,

B. C. HOWARD,
911 Commerce Building,
Kansas City 6, Missouri,
Attorney for Petitioners.

HARRY HOWARD,
230 Dierks Building,
Kansas City 6, Missouri,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 156

E. M. GEORGE-HOWARD AND WOODY SWEARINGEN,
PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

BRIEF FOR THE RESPONDENT IN OPPOSITION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT*

OPINIONS BELOW

The opinion of the District Court (R. 37-41) is reported in 55 F. Supp. 921. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 88-98) is reported in 153 F. (2d) 591.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 18, 1946 (R. 98-99). A petition for rehearing, filed on March 25, 1946 (R. 101-109), the time for filing having been extended to that date (R. 99), was denied April 2, 1946 (R. 111). The petition for a writ of certiorari was filed June 8, 1946. The jurisdiction of this Court is invoked under the provisions of

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals had jurisdiction to entertain the appeal.
2. Whether the District Court had jurisdiction to entertain the action.
3. Whether the District Court should have refused to exercise jurisdiction out of considerations of comity.
4. Whether the decision below conflicts with law established by Missouri State courts.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix, pp. 21-24, *infra*.

STATEMENT

The Federal Deposit Insurance Corporation (hereinafter called "FDIC") is a corporation duly created, organized, and existing under and by virtue of Sec. 12B of the Federal Reserve Act (Act of June 16, 1933, c. 89, sec. 8, 48 Stat. 168, as amended by the Act of August 23, 1935, c. 614, sec. 101, 49 Stat. 684 (12 U. S. C. 264)), with its principal place of business in the City of Washington, D. C. (R. 55-56). More than one-half of the capital stock of the FDIC is owned by the Government of the United States (R. 76, 77).

The Nevada Trust Company (hereinafter called "the Bank") on and prior to the second day of

December 1937 was a banking corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Nevada, Vernon County, Missouri (R. 56). It was then, and for some time prior thereto had been, an "insured bank," its deposits being insured by the FDIC (R. 56). On December 2, 1937, the Bank was closed by its directors and placed in the hands of R. Waldo Holt, Commissioner of Finance of the State of Missouri (hereinafter called "the Commissioner") for the purpose of liquidation (R. 56, 65). The Commissioner took possession and control of the assets and affairs of the Bank through L. R. Twyman, Special Deputy Commissioner of Finance (hereinafter referred to as "the Deputy Commissioner") (R. 13, 30).

Between December 2, 1937 and May 5, 1938, the FDIC paid the depositors of the Bank filing claims the amounts of their respective insured deposits therein (R. 56). In accordance with the requirements of U. S. C., Title 12, Section 264 (1) (7), as then in effect, the FDIC took an assignment of all claims each insured depositor had against the Bank (R. 56) which contained, *inter alia*, the following provisions:

For the purpose of subrogating the Federal Deposit Insurance Corporation of all of claimant's rights against said closed insured bank arising out of the INSURED DEPOSIT in the amount shown above to the

extent of the amount paid the receipt thereof is hereby acknowledged, claimant hereby assigns, transfers and sets over unto said Corporation all claims against said closed insured bank and its stockholders arising out of said insured deposit, together with all evidences of such indebtedness held by claimant. (R. 57.)

The aggregate amount paid by the FDIC to insured depositors of the Bank was \$120,948.14 (R. 58), for which sum, by virtue of the subrogation effected by the assignments aforesaid, the FDIC filed three proofs of claim with the Deputy Commissioner in the respective amounts of \$5,827.97, \$114,991.53, and \$128.64 (R. 58-59). Thereafter, the Deputy Commissioner allowed the FDIC's claims as filed (R. 58), which allowances were approved by the Circuit Court of Vernon County, Missouri (R. 59).

The Deputy Commissioner paid the FDIC its preferred claim in the amount of \$5,829.97 on May 20, 1938 (R. 59) and also paid the FDIC the following dividends on its common claims: 50% on May 23, 1938, 35% on October 26, 1938, 10% on May 21, 1940, and 5% on February 19, 1941 (R. 59). All other claims or demands against the Bank both of a preferred and common character have been paid and liquidated (R. 17, 30).

On or about February 26, 1941, the FDIC filed with the Deputy Commissioner its demand for interest in the aggregate sum of \$6,877.19, computed on its principal claim at 6% per annum

from December 2, 1937 to the dates of the various payments by the Deputy Commissioner as hereinabove set forth (R. 60). On April 4, 1941, the Commissioner rejected and disallowed FDIC's demand for interest aforesaid (R. 60).

On the 30th day of June 1941, an agreement was entered into by and between the FDIC and the defendant, E. M. George-Howard, holder of all of the outstanding capital stock of the Bank, wherein E. M. George-Howard agreed to place the disputed sum of \$6,877.19, representing the amount of the FDIC's claim for interest, in escrow with the defendant, Woody Swearingen, as Trustee, contemporaneously with the termination of the liquidation of the Bank, and upon the delivery to E. M. George-Howard by the Commissioner of the assets and surplus of the Bank remaining after the payment of all claims and demands against the Bank, with the exception of the FDIC's demand for interest (R. 60-61). The agreement further provided that the defendant, Woody Swearingen, should hold the sum so deposited to his credit as trustee until such time as the parties thereto should jointly give him directions as to disposition of payment thereof, or until a court of competent general jurisdiction should render a final valid judgment making disposition of the fund and directing him as to such disposition (R. 60-61).

The Circuit Court of Vernon County, Missouri, on June 30, 1941 ordered, adjudged, and decreed

that the final report and application for discharge of D. R. Harrison, Commissioner of Finance of the State of Missouri, the duly authorized and lawfully appointed successor to R. Waldo Holt, be approved (R. 61). On the same day the said court approved the agreement between the FDIC and the defendants, E. M. George-Howard and Woody Swearingen, and ordered and directed the Commissioner to surrender, deliver, and turn over to the defendant, E. M. George-Howard, as sole owner of all outstanding capital stock of the Bank, possession, control, and custody of all assets of the Bank of every kind, nature, and description (R. 61, 70). In accordance with said order, the Commissioner delivered such assets to the defendant, E. M. George-Howard, and on July 5, 1941 the sum of \$6,877.19 was deposited to the credit of Woody Swearingen, Trustee, as agreed (R. 61).

The FDIC thereupon on October 3, 1941 filed its petition in the United States District Court for the Western District of Missouri, Southwestern Division, praying (1) that the court adjudge and declare that the FDIC, as statutory subrogee and assignee of the depositors of the Bank be entitled to the payment of interest in the aggregate sum of \$6,877.19, computed at the rate of six percent per annum on its principal claim from December 2, 1937 to the dates of payment by the Deputy Commissioner, and (2) that an order be entered directing the defendant, Woody Swearingen, to

deliver and pay over to the FDIC the amount held by him in escrow (R. 1-9). - The cause was transferred on January 27, 1942 to the Western Division of the U. S. District Court for the Western District of Missouri (R. 11).

The District Court dismissed the action after trial, on the grounds (1) that the controversy was not one arising under the laws of the United States within the meaning of U. S. C. Title 28, Sec. 41 (1), as a basis for federal jurisdiction, and (2) that even if jurisdiction had thus existed, a federal court ought not to exercise it in the situation, for comity reasons, but should leave the controversy to be presented to the state circuit court which had supervised the liquidation (R. 46-48). On appeal the Circuit Court of Appeals for the Eighth Circuit reversed and remanded the case, with directions to enter judgment for FDIC (R. 98-99).

ARGUMENT

In essence the petitioners' contentions¹ resolve themselves into the questions whether the court below had jurisdiction of the appeal at all because of the holding of the district judge as to the constitutionality of a subsection of Section 12 of the Federal Reserve Act; whether the District Court had jurisdiction; whether the District Court for comity reasons should have de-

¹ Petitioners pose nine questions with subdivisions under each as the foundation for their petition for the issuance of a writ.

clined to exercise jurisdiction; and whether the decision below accords with Missouri law. We submit that the court below answered these questions correctly.

1. In refusing to give effect to the provision in 12 U. S. C. Sec. 264 (j) that "all suits of a civil nature * * * to which the Corporation shall be a party shall be deemed to arise under the laws of the United States", the District Court seemingly held that provision unconstitutional (R. 38-39). Section 2 of the Act of August 24, 1937 (50 Stat. 751, 752, 28 U. S. C. Sec. 349a) provides that in proceedings in which the United States or any agency thereof is a party "and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States * * *". Petitioners' contend that in view of this provision, the appeal from the judgment of the District Court in this case should have been taken directly to this Court rather than to the Circuit Court of Appeals (Pet. 13-14, 25). We submit that the statute embodies no such mandatory requirement.

The statute provides that under the circumstances there enumerated, an appeal *may* be taken directly to the Supreme Court (see Appendix, p. 21). This, on its face, is permissive, not mandatory. And the legislative history of the Act of August 24, 1937 (50 Stat. 751), shows that Congress had the distinction between *shall* and

may clearly before it. 81 Cong. Rec. 3270. Cf. *Farmers and Merchants Bank v. Federal Reserve Bank*, 262 U. S. 649, 662-663.

Furthermore, the provisions of the statute expressly show that it was regarded as proper that in those cases where all the factors were present which would make the statute applicable, appeals might nevertheless be taken to other than the Supreme Court. For, it is provided, "in the event that any such appeal is taken [under this section], any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States." Since there is a time limit of thirty days on the taking of an appeal under this section, the statute would seem clearly to be referring to the Circuit Court of Appeals when it mentions appeals "taken within sixty days after notice of an appeal under this section." The section, while giving to any party the option of appealing directly to this Court, would seem clearly to contemplate that in the event the option was not exercised appeal would lie as usual to the Circuit Courts of Appeal.

It is also clear from the legislative history that the statute was intended to provide an optional procedure for the expeditious final determination of questions concerning the constitutionality of acts of Congress. The report of the House Com-

mittee on the Judiciary, H. Rep. No. 212 (Cong., 1st Sess.) stated: 75th

The importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress requires no comment. It is provided by the committee amendment to this bill that the Attorney General *in his discretion* may appeal directly to the Supreme Court any decision or order of a lower court which is adverse to the constitutionality of an act of Congress, and that such appeal shall have precedence over other cases of the Supreme Court. [Italics supplied.]

Similar views were expressed in the debates in Cong. Rec. 3272, 8507.

During the debates the question of permitting parties other than the Attorney General to appeal directly to the Supreme Court arose. 81
8507. Concern was also expressed as to what would happen when a party had appealed to a Circuit Court of Appeals but the Attorney General had intervened on a constitutional question and wished to go directly to this Court. Gen- 3261. The act as finally passed met these questions by giving all parties the option of appealing directly to this Court, and by providing that in the event a party took such an appeal, any appeal taken to a Circuit Court of Appeals at the same time be consolidated with that in this Court. other
man v. McClelland, 284 Fed. 837, *United States v.*

Hoff-
tes v.

Jahn, 155 U. S. 109, and *Great Northern Ry. Co. v. Blaine County*, 252 Fed. 548, relied upon by petitioners all relate to a statute repealed in 1925, which provided for direct appeal to the Supreme Court in all cases in which the jurisdiction of federal courts was in issue. This statute was replaced by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, 938 (28 U. S. C. 345). Furthermore, the cases cited by petitioners recognize that under the statute there involved an appeal might be taken to the Circuit Courts of Appeal where the District (or Circuit) Court had decided jurisdictional and other questions. Then "the Courts of Appeals have jurisdiction to review both the jurisdictional question and the other questions determined." *Great Northern Ry. Co. v. Blaine County, Neb.*, 252 Fed. 548, 551 (C. C. A. 8); *United States v. Jahn*, 155 U. S. 109, 114-115. Cf. *McLish v. Roff*, 141 U. S. 661, 668.

Were the contrary the rule, an unnecessary burden would be placed upon this Court, requiring it in every instance to review an unsound decision on a constitutional question when the error otherwise would, as here, be readily corrected by the Circuit Court of Appeals. We submit that there is nothing either in the language or legislative history of the 1937 Act which requires such an undesirable result.

2. The District Court had jurisdiction of the instant suit. Commencing with the case of *Os-*

born v. Bank of United States, 9 Wheat. 738, it consistently has been held that litigation involving federally created corporations arises under the laws of the United States. *Pacific Railroad Removal Cases*, 115 U. S. 1; *Matter of Dunn*, 212 U. S. 374; *Bankers Trust Co. v. Texas & P. Ry. Co.*, 241 U. S. 295, 60 L. Ed. 1010; *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 256 U. S. 350. This doctrine extends to cases involving interpretation and application of state law. *Supreme Lodge Knights of Pythias v. Kalinski*, 163 U. S. 289; *Male v. A. T. & S. F. Ry. Co.*, 240 U. S. 97. From time to time Congress has by statute narrowed the class of federally chartered corporations to which the rule laid down by the line of cases led by the *Osborn* case applied. See *People of Puerto Rico v. Russell & Co.*, 288 U. S. 476, 485. The Act of February 13, 1925, c. 229, section 12, 43 Stat. 941 (28 U. S. C. 42) limits the jurisdictional meaning of Section 24 (1) (a) of the Judicial Code insofar as federally created corporations are concerned to those wherein the Government is the owner of more than one-half of the capital stock. But here the District Court has found that the United States owns more than one-half of the outstanding stock of FDIC (R. 47).² In such circumstances, it is clear that

² Petitioners attempt to cast doubt on the fact that the federal government owns more than one-half of the capital stock of FDIC. This argument finds no support in the record. Moreover, the annual reports of the FDIC to Congress for each year from 1934 to the present clearly show that, pur-

the District Court had jurisdiction. *Federal Intermediate Credit Bank v. Mitchell*, 277 U. S. 213; Moore's Federal Practice, p. 505.³

Despite petitioner's contention, *Gully v. First National Bank*, 299 U. S. 109, is not to the contrary. It specifically recognized that federal incorporation was a ground for federal jurisdiction where the United States holds more than one-half the stock (p. 113) and stated that although the "charter cases" were to be treated as exceptional, within their special field, "there was no thought to disturb them" (p. 114).

The second ground upon which federal court jurisdiction rests is U. S. C. Title 12, Sec. 264 (j) (4), which the District Court held unconstitutional. That section provides:

Upon June 16, 1933, the Corporation [FDIC] shall become a body corporate and as such shall have the power * * *

Fourth. To sue and be sued, complain and defend, in any court of law or equity, State

suant to the provisions of Subsection (d) of Section 12B of the Federal Reserve Act (U. S. C., Title 12, Section 264 (d)), the United States not only subscribed but also paid for and still holds \$150,000,000 of the capital stock of the Corporation and the 12 Federal Reserve Banks subscribed as well as paid for and still own \$139,299,556.99 of such stock. No stock has been issued to any person other than the Government and the Federal Reserve Banks. Annual Report of FDIC for year ended December 31, 1934, p. 11; id. 1935, p. 12; id. 1936, p. 36; id. 1937, p. 26; id. 1938, p. 38; id. 1939, p. 40; id. 1940, p. 32; id. 1941, p. 38; id. 1942, p. 24; id. 1943, p. 27; id. 1944, p. 29.

³ See also *Machine Tool & Equipment Corp. v. R. F. C.*, 131 F. (2d) 547 (C. C. A. 9).

or Federal. *All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States.*

The District Court held and petitioners now argue that the question of whether a given controversy arises under the laws of the United States is a judicial and not a legislative question. This Court has however held consistently that the jurisdiction of federal courts over cases and controversies involving federally chartered corporations presents a question in respect of which Congress has the ultimate say. *People of Puerto Rico v. Russell & Co., supra*; *Gully v. First National Bank, supra*. There is nothing in the nature of FDIC which calls for a departure from this accepted principle.⁴ In *D'Oench, Duhme & Co. v. FDIC*, 315 U. S. 447, 455, 467 this Court gave full effect to this principle, and recognized the explicit statutory provision manifesting congressional adherence to it, in so far as the FDIC is concerned.

Finally, even if the question were now open, and not controlled by any statute or accepted prin-

⁴ A similar provision relative to Federal Reserve Banks (U. S. C. Title 12, Sec. 632) has been sustained by the courts. *Federal Reserve Bank of Richmond v. Kalin*, 77 F. (2d) 50 (C. C. A. 4); *Federal Reserve Bank of Atlanta v. Atlanta Trust Co.*, 91 F. (2d) 283 (C. C. A. 5); *British-American Tobacco Co. v. Federal Reserve Bank of New York*, 105 F. (2d) 935 (C. C. A. 2).

ciple, the controversy here does arise under the laws of the United States, for the federal court jurisdiction is predicated on the fact that the relief sought in the subject suit arises out of the right of subrogation vested in the FDIC by U. S. C. Title 12, Sec. (1) (7).

The Federal Deposit Insurance Corporation was required under the provisions of Subsection (1) (6) of ~~its~~^{its} charter (*infra*, p. 22) to discharge its liability as insurer of deposits in the subject bank. Before doing so, however, it was compelled by Subsection (1) (7) (*infra*, p. 23) to make certain that its right to be subrogated to the rights of such depositors, should have been recognized either by express provision of state law, by allowance of claims by the authority having supervision of the bank, by assignment of claims by depositors, or by any other effective method.

Subsection (1) (7) further provides "In the case of any closed insured bank, such subrogation shall include the right on the part of the Corporation to receive the same dividends from the proceeds of the assets of such closed bank * * * as would have been payable to the depositor on a claim for the insured deposit." The depositors would have been entitled to payment of interest out of any surplus remaining in the hands of the liquidating agent after payment of the principal amount of creditor's claims as against stockholders. *Stein v. Delano*, 121 F. (2d) 975 (C. C. A.

3), certiorari denied, 314 U. S. 655 rehearing denied, 314 U. S. 711, rehearing denied, 314 U. S. 713. *FDIC v. Farmers Bank of Newtown* (Mo. App.) 180 S. W. (2d) 532. In bringing this action, Federal Deposit Insurance Corporation sought to enforce a right acquired by it pursuant to federal law, thus presenting a federal question. See *D'Oench, Duhme & Co. v. FDIC*, *supra*; *Sowell v. Federal Reserve Bank*, 268 U. S. 449.

3. This case presents no considerations of comity which would warrant a Federal Court in refusing to exercise jurisdiction. Petitioners contend and the District Court held that out of considerations of comity a Federal Court should not entertain jurisdiction of this suit on the ground that this suit, being for interest, is not separable from the claim for principal heretofore allowed by the Commissioner of Finance of the State of Missouri.

A federal court should not decline jurisdiction on comity considerations except in such special and peculiar circumstances and on the basis of such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. *Commonwealth Trust Co. of Pittsburgh v. Bradford*, 297 U. S. 613, *Meredith v. City of Winter Haven*, 320 U. S. 228, 88 L. Ed. 9. Such circumstances are not here presented.

First, there was no other court proceeding or administrative proceeding pending at the time the instant case was commenced. The liquidation of

the Nevada Trust Company had been terminated, the Commissioner of Finance discharged, and the disputed fund placed in the possession of an escrow agent mutually agreed upon by the parties hereto, its disposition to abide the joint order of the parties or the judgment of a court of competent jurisdiction. It is obvious from the provisions of the order entered by the State Circuit Court at the time the liquidation was terminated that further judicial action, if necessary, would be by way of a plenary suit between the real parties in interest in *any* court of competent general jurisdiction.

Had the state court desired to retain or to exercise jurisdiction over the interest controversy between the FDIC and the sole stockholder of the Bank, it could easily have done so. Instead it approved the delivery of the remaining assets of the Bank to petitioner George-Howard upon assurance that the latter would deposit an amount sufficient to satisfy the FDIC's demand, not with an officer of the court, but with an escrow agent mutually agreeable to the FDIC and E. M. George-Howard. The very purpose of the creation of the escrow was to terminate the state liquidation and the proceedings pending before the Circuit Court. The turn-over order to E. M. George-Howard was unconditional and final, for it directed that E. M. George-Howard be recognized henceforth as the absolute owner of the residual assets of the bank.

The State Circuit Court properly considered its jurisdiction terminated with the winding up of the receivership. The Commissioner of Finance of the State of Missouri in winding up the affairs of a bank is a statutory liquidating agent as distinguished from an equity receiver. He is not appointed by the court, and his functions are not dependent on the court's approval except in instances specifically provided by statute. *Commercial Bank of Jamesport v. Songer*, 229 Mo. App. 168. When the Commissioner is discharged, the liquidation is terminated, and the statutes, from which the State Circuit Courts derive such jurisdiction as they have over the liquidation, do not invest them with a continuing jurisdiction over matters relating to the liquidation after the Commissioner's discharge. The court below, we submit, correctly decided that no comity considerations justified the District Court in refusing to exercise jurisdiction. *Wilhoit v. FDIC*, 143 F. (2d) 14 (C. C. A. 6).

4. The decision of the court below accords with Missouri law. The final contention of petitioners is that the decision of the Circuit Court of Appeals is contrary to the law enunciated by the Missouri State courts. We submit that there is no merit to this contention in view of the fact that the Kansas City Court of Appeals, an Appellate Court of Missouri, has ruled on the exact question presented by the case at bar in *FDIC v. Farmers Bank of Newtown*, 180 S. W. (2d) 532. In that

case it was held that where the FDIC paid insured depositors of a closed bank the amount of their deposits and obtained from each depositor an assignment of his claim, and the bank subsequently proved to have surplus assets after payment of all claims, the FDIC was entitled to interest on depositors' claims computed from the date the bank closed until the FDIC received payment. The defendant in the *Newtown* case raised the same contentions which are maintained by the petitioners herein and the court held them to be of no avail.⁵ *State v. Sevier*, 337 Mo. 1174, urged by petitioners as evidencing a different rule is not in point. There a writ of prohibition was granted to prevent an unauthorized state court from interfering with the Commissioner of Finance in the liquidation of a bank. Here, the liquidation had been completed and the Commissioner had no further interest in the matter.

The holding in the *Newtown* case is in accordance with the uncontradicted weight of authority. The FDIC's right to interest on claims assigned to it has heretofore been sustained in the following cases as well as in the *Newtown* case: *Wilhoit v. FDIC*, 143 F. (2d) 14 (C. C. A. 6) (also see *FDIC v. Wilhoit*, 297 Ky. 339); *FDIC v. Leggett*,

⁵ Concededly, the Kansas City Court of Appeals is an intermediate appellate state court, but under the doctrine of *West v. A. T. & T. Co.*, 311 U. S. 223, the decisions of intermediate appellate courts are indicative of the state law in the absence of a ruling by the highest court of the state, and should be so recognized by federal courts.

204 Ark. 780; *Bates v. Farmers Savings Bank of Ankeny*, 231 Ia. 1151; *FDIC v. Oconto County State Bank*, 241 Wis. 369; *Haugo v. FDIC* (S. D. 1944), 15 N. W. (2d) 744.

CONCLUSION

The decision is correct and does not conflict with decisions of the United States courts and Missouri courts nor violate constitutional rights. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

✓ J. HOWARD McGRATH,
Solicitor General.

✓ JOHN F. SONNETT,
✓ *Assistant Attorney General.*

✓ PAUL A. SWEENEY,
RAY B. HOUSTON,
Attorneys.

✓ JAMES M. KANE,
Solicitor, Federal Deposit Insurance Corp.,
✓ *Of Counsel.*

JEROME WALSH,
WILLIAM E. TRUDE,
Attorneys.

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APPENDIX

Section 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751, 752 (28 U. S. C. 349a) provides:

In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within sixty days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States. In the event that an appeal is taken under this section, the record shall be made up and case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like

character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law.

Section 12 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941 (28 U. S. C. 42) provides:

That no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress: *Provided*, That this section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock.

Subsection (1) (6) of Section 12B of the Federal Reserve Act, as amended by the Act of August 23, 1935, c. 614, Title I, Section 101, 49 Stat. 684, 695 (12 U. S. C. 264 (1) (6)) provides:

Whenever an insured bank shall have been closed on account of inability to meet the demands of its depositors, payment of the insured deposits in such bank shall be made by the Corporation as soon as possible, subject to the provisions of paragraph (7) of this subsection, either (A) by making available to each depositor a transferred deposit in a new bank in the same community or in another insured bank in an amount equal to the insured deposit of such depositor and subject to withdrawal on demand, or (B) in such other manner as the board of directors may prescribe: *Provided*, That the Corporation, in its discre-

tion, may require proof of claims to be filed before paying the insured deposits, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured deposit, it may require the final determination of a court of competent jurisdiction before paying such claim.

Subsection (1) (7) of Section 12B of the Federal Reserve Act, as amended by the Act of May 25, 1938, c. 276, 52 Stat. 442 (12 U. S. C. 264 (1) (7)) provides:

In the case of a closed national bank or District bank, the Corporation, upon the payment of any depositor as provided in paragraph (6) of this subsection, shall be subrogated to all rights of the depositor against the closed bank to the extent of such payment. In the case of any other closed insured bank, the Corporation shall not make any payment to any depositor until the right of the Corporation to be subrogated to the rights of such depositor on the same basis as provided in the case of a closed national bank under this section shall have been recognized either by express provision of State law, by allowance of claims by the authority having supervision of such bank, by assignment of claims by depositors or by any other effective method. In the case of any closed insured bank, such subrogation shall include the right on the part of the Corporation to receive the same dividends from the proceeds of the assets of such closed bank and recoveries on account of stockholders' liability as would have been payable to the depositor on a claim for the insured deposit, but such depositor shall retain his claim for any uninsured

portion of his deposit: *Provided*, That, with respect to any bank which closes after the date this paragraph as amended takes effect, the Corporation shall waive, in favor only of any person against whom stockholders' individual liability may be asserted, any claim on account of such liability in excess of the liability, if any, to the bank or its creditors, for the amount unpaid upon his stock in such bank; but any such waiver shall be effected in such manner and on such terms and conditions as will not increase recoveries or dividends on account of claims to which the Corporation is not subrogated: *Provided further*, That the rights of depositors and other creditors of any State bank shall be determined in accordance with the applicable provisions of State law.